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VIA CERTIFIED MAIL, RETURN
RECEIPT REQUESTED

Jessica Priest
The Victoria Advocate
311 E. Constitution
Victoria, Texas 77901

February 5, 2019

Re: Public Information Act Request from the Victoria Advocate

Ms. Priest,

The Calhoun Port Authority ("the Port") is in receipt of three Public Information Act requests that you submitted to the Port on January 22, 2019. One request seeks "a copy of the two-prong strategy to fix the port's design deficiency and the legislative language former port lobbyist Blank Farenthold came up with and mentioned in his Jan. 4 letter of resignation." Another request seeks "a copy of records that show what expenses Farenthold billed the Calhoun Port Authority for and what, if anything, Calhoun Port Authority reimbursed him since May 2018." The Port has no documents responsive to either of these requests.

The third request sought attorney fee information regarding our firm, Cobb & Counsel. Please be advised that the Calhoun Port Authority wishes to withhold that information and is seeking an Attorney General opinion on whether the requested information falls within an exception to public disclosure in the Act.

Sincerely,

Bill Cobb



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February 5, 2019

VIA HAND DELIVERY

Office of the Attorney General
Open Records Division
300 W. 15th Street
Austin, TX 78701

Re: Calhoun Port Authority, Request for Attorney General Opinion Ruling on Public Information Act Request from the Victoria Advocate

General Paxton:

Pursuant to TEX. GOV'T CODE § 552.031(b), the Port seeks an Attorney General opinion ruling regarding a recent request under the Public Information Act, TEX. GOV'T CODE § 552.001, *et seq.*

FACTUAL BACKGROUND

On May 21, 2018, Victoria Advocate Publishing Co. ("the Advocate") filed suit against the Port, alleging violations of the Open Meetings Act. The case is styled *Victoria Advocate Publishing Co. v. Calhoun Port Authority*, Cause No. 2018-CV-3354-DC, in the 135th District Court of Calhoun County, Texas.

On June 6, 2018, the Port engaged the law firm of Cobb & Counsel PLLC to represent it in the litigation pending with the Advocate. Cobb & Counsel PLLC has continuously represented the Port since that time.

On August 27, 2018, the Advocate filed its Third Amended Petition, which is the live petition in the case. Attached as Exhibit A is the Advocate's Third Amended Petition.

On September 5, 2018, the Port filed an interlocutory appeal challenging the district court's subject matter jurisdiction in the Thirteenth Judicial District Court of Appeals, styled *Calhoun Port Authority v. Victoria Advocate Publishing Co.*, with Cause No. 13-18-00486-CV. Attached as Exhibit B is the online docket sheet, reflecting that the appeal remains pending.

On January 22, 2019, the Advocate submitted a Public Information Act request to the Port. The Request is attached hereto as Exhibit C. The Advocate seeks the following information from the Port:

- (1) Any and all documentation of payments made by the Calhoun Port Authority to the law firm of Cobb & Counsel;

- (2) Any and all documentation of hours worked by Cobb & Counsel for the Calhoun Port Authority; and
- (3) Any and all amendments to the fee agreement between Cobb & Counsel and the Calhoun Port Authority and any and all addenda to such agreements.

For Requests 1 and 2, the Port has determined that its attorney billing statements and copies of the Port's checks to Cobb & Counsel are responsive to these Requests. The Port has attached those documents for the Attorney General's review as Exhibit D. The responsive information, contained in Exhibit D, will be referred to collectively herein as "attorney billing statements." These attorney billing statements relate to the litigation filed against the Port by the Advocate. These attorney billing statements are not subject to disclosure for the reasons outlined below.

For Request 3, the Port does not have responsive information because no amendments have been made to the original fee agreement between Cobb & Counsel and the Port.

CLAIMED EXCEPTIONS

The Port's attorney billing statements are excepted from disclosure under TEX. GOV'T CODE § 552.103 and TEX. GOV'T CODE § 552.101 (which invokes TEX. R. EVID. 503 and TEX. R. CIV. P. 192.5). Specifically, the Port's attorney billing statements are confidential pursuant to the Public Information Act's "litigation exception" and the attorney client and work product privileges, and thus, they are not subject to disclosure under the Public Information Act.

ARGUMENTS AND AUTHORITIES

- A. Pursuant to TEX. GOV'T CODE § 552.002, the Port's attorney billing statements are excepted from disclosure if they are made confidential "under this chapter"—by the Public Information Act itself—or by "other law."

Under the Public Information Act, attorney billing statements are subject to disclosure unless protected as confidential by the Public Information Act or other law: "the following categories of information are public information and not excepted from required disclosure *unless made confidential under this chapter [the Public Information Act] or other law: . . . (16) information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege.*" TEX. GOV'T CODE § 552.022(a)(16) (emphasis added).

Section 552.022(b) reiterates that information may be withheld under exceptions contained within the Public Information Act or under "other law":

A court in this state may not order a governmental body or an officer for public information to withhold from public inspection any category of public information described by Subsection (a) or to not produce the category of public information for inspection or duplication, *unless the category of information is confidential under this chapter or other law.*

TEX. GOV'T CODE § 552.022(b) (emphasis added). Thus, where the attorney billing statements contain information that is confidential under the Public Information Act or "confidential under other law," disclosure is not required.

B. Pursuant to TEX. GOV'T CODE § 552.103, the Port's attorney billing statements are "made confidential under this chapter" and exempt from disclosure because they contain information relating to pending litigation.

The Port's attorney billing statements are protected from disclosure under Section 552.103, also known as the litigation exception. It provides that "information *relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party*" is not subject to disclosure under the Public Information Act. TEX. GOV'T CODE § 552.103 (emphasis added). The exception further provides that "Information relating to litigation involving a governmental body . . . is excepted from disclosure . . . only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information." TEX. GOV'T CODE § 552.103(c).

This exception is interpreted broadly. That is, "related to" ordinarily means "pertaining to," "associated with," or "connected with." *Univ. of Texas Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 483 (Tex. App.—Austin 1997, no pet.). In fact, this interpretation is so broad that information can be "related to" litigation without being "relevant to the substantive issues in the litigation." *Id.*

Here, the Port is a political subdivision and a governmental body. SPECIAL DISTRICT LOCAL LAWS CODE § 5003.001, *et seq.* (creating the Port as a special navigation district); TEX. GOV'T CODE § 552.003 (defining "governmental body"). At the time of the January 22, 2019 request, the Advocate's litigation against the Port remained pending. And the information requested seeks information created only during the pendency of that litigation. That is, the information responsive to the Request begins in June 2018, after the litigation was filed in May 2018. And, the substance of Exhibit D relates to the litigation. As a result, Exhibit D is not subject to disclosure under the Public Information Act.¹

C. Pursuant to TEX. GOV'T CODE § 552.101 and "other law"— the attorney client and work product privileges – the Port's attorney billing statements are confidential and thus, exempt from disclosure.

The Port's attorney billing statements are protected by the attorney client and work product privileges. As a result, they are confidential pursuant to TEX. GOV'T CODE § 552.101 and "other law," namely, the attorney-client and work product privileges. *See* TEX. R. EVID. 503 and TEX. R. CIV. P. 192.5.

Section 552.101 provides that information need not be disclosed under the Public Information Act "if it is information considered to be *confidential by law*, either constitutional, statutory, or by judicial decision." TEX. GOV'T CODE § 552.101 (emphasis added). A plurality of the Texas Supreme Court has stated "Section 552.101 of the Texas Public Information Act exempts information considered confidential by law, *including information falling under the attorney client privilege.*" *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 n.5 (Tex. 2014) (plurality op.) (emphasis added). And as the Dallas Court of Appeals has likewise held, "the attorney-client privilege may be asserted under section 552.101."

¹ In addition, Section 552.103 protects information subject to the work product privilege: "Section 552.103 of the Act, which exempts information about litigation or settlement negotiations involving a governmental entity, incorporates the attorney work-product privilege." *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 n.5 (Tex. 2014) (plurality op.). The entirety of Exhibit D relates to the pending litigation of the Advocate against the Port, to which the Port is a party. And as outlined in Part C, the entirety of Exhibit D is protected by the attorney work product privilege, as provided in TEX. R. CIV. P. 192.5. For this additional reason, Exhibit D is not subject to disclosure under the Public Information Act.

Abbott v. City of Dallas, 453 S.W.3d 580, 586 (Tex. App.—Austin 2014), *aff'd sub nom. Paxton v. City of Dallas*, 509 S.W.3d 247 (Tex. 2017).²

Furthermore, as outlined above, attorney billing statements are subject to disclosure unless protected as confidential by the Public Information Act or “other law.” TEX. GOV’T CODE § 552.022(a)(16). The Texas Supreme Court has expressly held that the “Texas Rules of Civil Procedure and the Texas Rules of Evidence are ‘other law’ within the meaning of section 552.002.” *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). In turn, the Texas Rules of Civil Procedure and the Texas Rules of Evidence embody the attorney-client privilege and the work product privilege. TEX. R. EVID. 503; TEX. R. CIV. P. 192.5.

Because the attorney billing statements fall under both the attorney client and work product privileges, they are confidential under TEX. GOV’T CODE § 552.101 and “other law,” and not subject to disclosure.

1. The Port’s attorney billing statements are privileged under TEX. R. EVID. 503.

Texas Rule of Evidence 503 provides the framework for the attorney-client privilege:

General Rule. A client has a privilege to refuse to disclose and to prevent any other person from disclosing **confidential communications made to facilitate the rendition of professional legal services** to the client: (A) **between the client or the client’s representative and the client’s lawyer** or the lawyer’s representative;

TEX. R. EVID. 503 (emphasis added). That is, to withhold information protected by the attorney client privilege under the Public Information Act, a governmental body must “(1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client.” TEX. ATT’Y GEN. Op. OR2002-5749 (Oct. 10, 2002) (protecting attorney fee bill information pursuant to attorney-client privilege).

Time and time again, this office has protected attorney billing information under the attorney client privilege. *E.g.*, TEX. ATT’Y GEN. Op. OR2002-4734 (Aug. 26, 2002) (“After review of your arguments and the submitted documents, we agree that much of the information in the submitted fee bills consists of confidential communications protected by the attorney-client privilege and Rule 503.”); TEX. ATT’Y GEN. Op. OR2002-5419 (Sept. 26, 2002) (withholding portions of payment records from private law firms pursuant to TEX. R. EVID. 503); TEX. ATT’Y GEN. Op. OR2003-0646 (Jan. 30, 2003) (“Therefore, we have marked this information on the attorney fee bills, which the city may withhold under Rule 503.”).

As outlined by Charles Hausmann, the Port’s Director, in Exhibit 1, attached hereto, the documents contained in Exhibit D constitute privileged communications under TEX. R. EVID. 503. Mr. Hausmann has the authority, with Board approval, to obtain professional legal services for the Port. Furthermore, he

² On appeal, while the Texas Supreme Court affirmed the Dallas Court of Appeals, it noted that “Because the parties agree the attorney-client exception applies to the requested information, we need not consider whether privileged and confidential attorney-client information is also protected by the confidential-by-law exception.” *Paxton v. City of Dallas*, 509 S.W.3d 247, 256 n.47 (Tex. 2017).

has the authority to act for the Port on the legal advice rendered (and obtain Board approval for such actions, as necessary). The entirety of the documents contained in Exhibit D are documents or communications between Mr. Hausmann on behalf of the Port and Cobb & Counsel, the Port's attorneys. These documents and communications are confidential. That is, they were not intended to be disclosed to third persons and were made by Cobb & Counsel in furtherance of the rendition of professional legal services to the Port. For these reasons, the entirety of Exhibit D is not subject to disclosure under the Public Information Act.³

2. The Port's attorney billing statements are work-product under TEX. R. CIV. P. 192.5.

"Work product" is defined as follows:

- (1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or
- (2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents.

TEX. R. CIV. P. 192.5(a). The work product privilege serves to "shelter the mental processes, conclusions, and legal theories of the attorney, providing a privileged area within which the lawyer can analyze and prepare his or her case." *In re National Lloyds Insurance Co.*, 532 S.W.3d 794, 803 (Tex. 2017). To protect information pursuant to the work-product privilege, a governmental body must "demonstrate that the material, communication, or mental impression was created for trial or in anticipation of litigation." TEX. ATT'Y GEN. Op. OR2002-5749 (Oct. 10, 2002) (where portions of attorney fee bills contained "impressions, opinions, conclusions, or legal theories of attorneys," work product privilege protected information from disclosure).

As the Texas Supreme Court has recently held, "a request to produce all billing records invades a party's work-product privilege because, cumulatively, billing records constitute a mechanical compilation of information that, at least incidentally, reveals an attorney's strategy and thought process." *In re National Lloyds Insurance Co.*, 532 S.W.3d 794, 803 (Tex. 2017). Simply put, "[b]illing records constitute 'communication[s] made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives.'" *Id.* at 804. And in their entirety, billing records "represent the mechanical compilation of information that reveals counsel's legal strategy and thought processes, at least incidentally." *Id.*

Likewise, this office has protected attorney fee bills under the work-product privilege. TEX. ATT'Y GEN. Op. OR2004-3601 (May 3, 2004) ("Further, you have demonstrated that some of the information in the submitted fee bills consists of an attorney's or an attorney's representative's mental impressions, opinions, conclusion, or legal theories. Accordingly, we have marked the information the city may

³ The Port does not waive the attorney client privilege simply because the claim it is defending provides the trial court may award attorneys' fees to the party that substantially prevails. TEX. GOV'T CODE § 551.142(b) ("The court may assess costs of litigation and reasonable attorney fees incurred by a plaintiff or defendant who substantially prevails"). The Port's Answer indicates that should it "substantially prevail in this action, it will seek its costs of litigation and reasonable attorneys' fees." The Port has not asserted any claim for affirmative relief, and its attorneys' fees will only become relevant post-judgment.

withhold under rule 192.5 of the Texas Rules of Civil Procedure.”); TEX. ATT’Y GEN. Op. OR2002-5419 (Sept. 26, 2002) (“Upon review of the submitted documents, we conclude that a portion of the information in the submitted fee bills is core work product that is privileged.”).

While the narratives in the billing statements and the communications to the client certainly fall under the privilege, the aggregate time and cost of attorneys’ fees are also protected and not subject to disclosure. That is, redacting the narratives is not enough to protect the privileged information. “Aggregate fee summaries also reveal strategic choices. . . . A dramatic increase in mid-litigation spending could imply an upcoming filing or significant research expenditures related to elevated concerns over recent litigation events.” *In re National Lloyds Insurance Co.*, 532 S.W.3d 794, 806 (Tex. 2017).

Again, the entirety of Exhibit D is protected by the work product privilege in TEX. R. CIV. P. 192.5(a). Specifically, these communications and Statements of Services contain material prepared or mental impressions developed for trial by Cobb & Counsel, the Port’s attorneys. Specifically, these documents and communications include the material prepared or mental impressions developed for trial by attorneys Bill Cobb, Matthew Ploeger, Jenny Smith, and Carly Barton. Furthermore, disclosing the aggregate billing time, even without the narratives of the lawyers, would reveal strategic choices the Port has made in the litigation (and continues to make in the litigation). For these reasons, the entirety of Exhibit D is protected under the work product privilege.

Please feel free to contact me should you have any questions. We look forward to receipt of your opinion on this issue.

Sincerely,



Bill Cobb
Attorney for the Calhoun Port Authority

cc:

**Via Certified Mail, Return Receipt Requested
(w/o exhibits)**

Jessica Priest
The Victoria Advocate
311 E. Constitution
Victoria, Texas 77901